IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1419 OF 2004

Harsha Ambo Dalvi. ... Appellant.

Versus.

Smt.Jayashri Janardan Patil. ... Respondent.

Shri Arun Palekar for the Appellant.

Ms.Vaidehi Mhaispurkar for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 10th March, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. The following substantial question of law arises in the Second Appeal:

(i) Whether the suit for declaration filed by the Respondent/Plaintiff was maintainable in view of the finding recorded by the trial Court that the suit property was admittedly in possession of the Appellant/Defendant ?

By consent the Appeal is taken up forthwith for final hearing. A perusal of the impugned Judgment of the Appellate Court shows that the Appellate Court has not dealt with the finding recorded by the trial Court in paragraph 15 of its Judgment as regards possession of the suit property. Without considering the said finding the Appellate Court has proceeded to pass a decree of

declaration in favour of the Respondent when confronted with this aspect, the learned Counsel for the Respondent fairly stated that the impugned Judgment and Decree of the Appellate Court may be set aside and the Appeal may be remanded to the Court of the Additional District Judge, Kalyan for hearing the same afresh. The learned Counsel appearing fro the Appellant states that if the order of remand is passed, till disposal of the Appeal by the District Court, the Appellant will not create any third party interest in respect of the suit property.

2. In view of this submissions made by the learned Counsel for the parties, the following order is passed:

(i) The impugned Judgment and order dated 17th September 2004 is quashed and set aside and the Civil Appeal No.13 of 2002 is remanded to the Court of the learned Additional District Judge, Kalyan, for deciding the same afresh.

(ii) The parties will appear before the learned Additional District Judge at Kalyan on 4th April 2005 at 11.00 a.m. for fixing the schedule of hearing.

(iii) The learned Additional District Judge will her and decide the Appeal as expeditiously as possible and preferably on or before 30th

September 2005.

(iv) All contentions on merits are kept expressly kept open.

(v) Till disposal of the appeal by the learned Additional District Judge, the Appellant will not create any third party interest in respect of the suit property.

(vi) The Appeal is partly allowed in the above terms with no order as to costs.

(vii) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.